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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MARNI M. GUY, Individually and on
behalf of all others similarly situated,

Plaintiffs,

vs.

CASAL INSTITUTE OF NEVADA,
LLC doing business as AVEDA
INSTITUTE LAS VEGAS, ARTHUR
J. PETRIE, JOHN GRONVALL, and
THOMAS CIARNELLO,

Defendants.

Case No.: 2:13-cv-2263-APG-GWF

**PLAINTIFF'S REPLY TO
DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFF'S
MOTION TO REARGUE AND
AMEND THE COURT'S ORDER
(DOCKET #88) GRANTING IN
PART AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS**

Plaintiff, through by and through her attorneys, Leon Greenberg Professional Corporation and Gabroy Law Offices, hereby submits this Reply to Defendants' Response in Opposition to Plaintiff's Motion to Reargue and Amend the Court's Order (Docket #88) Granting in Part and Denying in Part Defendants' Motion to Dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

In Response to Defendants' Mischaracterization of Plaintiff's Motion as an "Extremely Late Surreply"

Defendants' characterization of plaintiff's motion as an "extremely late surreply" (Doc. No. 93 at p.3) is inappropriate. In actuality it is defendants who are now, for the *first time* in the more than 13 months since this case has been pending, arguing that the individual defendants, Arthur J. Petrie, John Gronvall, and Thomas Ciarnello, are not liable as employers under the Fair Labor Standards Act ("FLSA"). Defendants use their opposition to plaintiff's motion to reargue and amend the Court's order to retroactively raise defenses concerning individual employer liability. The only portion of defendants' original motion to dismiss, the one ruled upon by the Court, relating to individual employer liability was at III(D), pages 7-8, where defendants argued no liability under *Nevada law*, not the Fair Labor Standards Act, could properly be imposed against the individual defendants.

ARGUMENT

I. RECONSIDERATION OF THE COURTS ORDER IS PROPER UNDER THESE CIRCUMSTANCES

A) The Court's Order was Manifestly Unjust

The Court is aware of its inherent powers to reconsider its prior orders. The Ninth Circuit Court of Appeals has stated, "[r]econsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993).

As stated in plaintiff's moving papers, it would be fundamentally unfair to allow the dismissal of the plaintiff's FLSA claims against the individual defendants to stand and uphold the dismissal of those claims without notice or an opportunity to be heard. Defendants made no argument to this Court that the individual defendants were not subject to liability under the FLSA and plaintiff was never given any

1 opportunity to address such claims. The Court's unintended result of dismissing such
2 FLSA claims is akin to a *sua sponte*, and without notice, dismissal of such claims.

3 The Northern District of California, faced with a near identical situation in
4 which the defendants never argued against the propriety of individual defendant
5 liability under the FLSA in their motion to dismiss, stated the following:

6 "Plaintiffs argue that they also have standing to bring an FLSA claim
7 against the individual Ali Defendants because they have adequately alleged
8 that these Defendants are "employers" under the FLSA. Defendants do not
9 address this argument. The FLSA defines employer as "any person acting
10 directly or indirectly in the interest of an employer in relation to an employee."
11 29 U.S.C. § 203(d). "Employer" under the FLSA is not limited to the common
12 law concept of employer but is given an expansive definition. *Boucher v.*
Shaw, 572 F.3d 1087, 1090–91 (9th Cir.2009). "Where an individual exercises
13 'control over the nature and structure of the employment relationship,' or
14 'economic control' over the relationship, that individual is an employer within
15 the meaning of the Act, and is subject to liability." *Id.* at 1091 (citing *Lambert*
16 *v. Ackerley*, 180 F.3d 997, 1012 (9th Cir.1999)).

17 Here, Plaintiffs allege that the individual Ali Defendants own and/or
18 control the relevant auto body repair shops. (FAC ¶ 9.) Plaintiffs further allege
19 that the individual Ali Defendants controlled Plaintiffs' work environment and
20 the policy decisions that led to the wage and hour violations. (FAC ¶ 9b.)
21 Although these allegations are somewhat conclusory, Defendants do not argue
22 that [the individual defendants] are not employers under the FLSA's broad
23 definition. Therefore, Plaintiffs have adequately alleged standing to bring an
24 FLSA claim against...[the individual Ali Defendants]."

25 *Sandoval v. Ali*, 2014 WL 1311776 at *4 (N.D. Cal. March 28, 2014). The court
26 should follow the holding in *Sandoval* and reconsider its order dismissing the FLSA
27 claims against individual defendants and find that such claims were properly pleaded.

28 **B) The Court's Order was Clearly Erroneous**

The Court's Order never addressed any dismissal of the claims against the
individual defendants under the FLSA. It contained no analysis of the proper, or
improper, status of Gronvall, Petrie, and Ciarnello as individual defendants under the
FLSA. Rather, the court engaged in a "piercing of the corporate veil" analysis, which
it found was determinative of the plaintiffs' state law claims against the individual
defendants, a finding for which no reconsideration is sought. Such an analysis is not
determinative of liability against individual defendants under the FLSA. *See, Rimes*
v. Noteware Development LLC, 2010 WL 3069250 at *3 (N.D. Cal. Aug. 4, 2010)

(Failure to plead alter ego allegations with sufficient specificity is immaterial as to claims under the FLSA, which imposes “direct liability” on individual employers for violations of the FLSA”).

C) Defendants misrepresent the complaint’s allegations.

Defendants now assert for the first time in this litigation that plaintiff’s complaint fail to sufficiently plead facts to support an FLSA against the individual defendants. Defendants blatantly disregard the complaint’s allegations in making such assertion as the complaint alleges much more than mere “ownership” by the individual defendants of the corporate defendant, as defendants assert at Docket #93, p. 5, l. 15-16. The complaint specifically alleges the individual defendants have engaged in the *actual, express decision-making that caused the FLSA violations at issue*. The Court is directed to the complaint’s allegations at paragraphs 38-46, which are summarized below:

38. The defendants Petrie, Gronvall, and Ciarnello, by virtue of their ownership and/or control of Casal, were empowered to make, and did make, the decisions to have Casal institute and/or continue the defendants’ practices that are alleged to have created an employer and employee relationship between Aveda Institute of Las Vegas and the plaintiffs and the class members for the purposes of the FLSA and state minimum wage laws that are alleged in this complaint, such actions by Petrie, Gronvall, and Ciarnello also causing the violations of the FLSA and state law alleged in this complaint.
39. The defendants Petrie, Gronvall, and Ciarnello, by virtue of their ownership and/or control of Casal could have, but did not, make the decision to have Casal discontinue the defendants’ practices that are alleged to have created an employer and employee relationship between Casal and the plaintiffs and the class members for the purposes of the FLSA and the state minimum wage laws that are alleged in this complaint, such actions by Petrie, Gronvall, and Ciarnello also causing the violations of the FLSA and state law alleged in this complaint.
40. The defendants Petrie, Gronvall, and Ciarnello, despite having the power to do so, did not direct Casal to discontinue the practices that are alleged to have created an employer and employee relationship between Casal and the plaintiffs and the class members for the purposes of the FLSA and the state minimum wage laws that are alleged in this complaint, such actions by Petrie, Gronvall, and Ciarnello also causing the violations of the FLSA and state law alleged in this complaint. The defendants Petrie, Gronvall, and Ciarnello failed to take such action because doing so would have diminished the profits of Casal and such diminishment of profits would have in turn diminished the financial returns enjoyed by defendants Petrie, Gronvall, and Ciarnello from their ownership or control of Casal.

46. In light of the foregoing set of facts, the defendants Petrie, Gronvall, and Ciarnello are properly deemed “employers” of the plaintiffs and the class members within the meaning of the FLSA and the state laws alleged in that defendants Petrie, Gronvall, and Ciarnello were acting as decision making “agents of an employer” and were the controlling persons of Casal and the beneficial owners of Casal and the Aveda Institute of Las Vegas with the power to implement, continue and/or terminate the illegal policies and practices that are alleged to have violated the FLSA and the state laws that are alleged in this complaint. The defendants Petrie, Gronvall, and Ciarnello not only were vested with such powers, but also knowingly exercised such powers to continue the violations of the FLSA and the state laws that are alleged in this complaint and/or they acquiesced to the continuation of such violations despite having the power and duty to prevent and stop the same. The imposition of such liability upon the defendants Petrie, Gronvall, and Ciarnello is also proper because they expressly directed Casal to commit the criminal acts that violated the FLSA and the state laws alleged and as a result should be held civilly liable for such violations of law.

The foregoing allegations that the individual defendants expressly made the decisions to have the corporate defendants conduct their personal services business in violation of the FLSA sufficiently state a claim that the individual defendants are properly deemed “employers” under the FLSA, as in *Lambert v. Ackerley*, 180 F.3d 997, 1001-02 (9th Cir. 1999) and other cases. Moreover, such allegations are entirely consistent with information concerning the role of at least one of the individual defendants in recently produced discovery by defendants in this case. *See*, Ex. “A,” Bates labeled AVEDA003864 and filed under seal.

II. DEFENDANTS CITE TO INAPPOSITE CASE LAW DISCUSSING INDIVIDUAL EMPLOYER LIABILITY UNDER THE FLSA

Defendants, without any citation to controlling authority, make the following unsupported statements: “individual liability under the FLSA is structured around a very personal interaction between an employer and employee” and “distinct personal control of certain aspects of the workplace is the factor upon which individual liability often relies.” *See*, Docket #93, p. 4., l. 1-2, 14-15. Defendants cite to no supporting authority for these statements because none exist. Defendants then go on to discuss at length three appellate decisions in which individual employer liability under the FLSA was addressed: *Lambert v. Ackerly*, 180 F.3d 997 (9th Cir. 1999); *Irizarry v. Catsimatidis*, 722 F.3d 99 (2nd Cir. 2013); and *Gray v. Powers*, 673 F.3d

1 352 (5th Cir. 2012).

2 In these three cases the Courts of Appeal were all determining the individual
3 employer liability issue after the development of a full evidentiary record and a trial
4 or a summary judgment determination. The issue before this court now is a dismissal
5 of the individual defendants based upon the pleadings and not a full evidentiary
6 record. The issue is not what the plaintiff *has proven* or shown by the evidence *that*
7 *she can prove if believed* but, rather, *what the plaintiff has alleged*.

8 In reviewing the sufficiency of pleadings to survive a motion to dismiss, the
9 court must take all allegations of material fact as true and construe them in the light
10 most favorable to the nonmoving party, although “conclusory allegations of law and
11 unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins*
12 *v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.2009). While “a complaint need not contain
13 detailed factual allegations ... it must plead ‘enough facts to state a claim to relief that
14 is plausible on its face.’” *Id.* “The plausibility standard is not akin to a ‘probability
15 requirement,’ but it asks for more than sheer possibility that a defendant acted
16 unlawfully.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167
17 L.Ed.2d 929 (2007).

18 Here, as demonstrated above, plaintiff’s allegations at paragraphs 38-46 of her
19 complaint more than adequately allege enough facts to state a claim for relief that is
20 plausible on its face. Plaintiffs have shown, through such allegations that the
21 individual defendants exercised economic and actual control over the defendants’
22 personal services business (§ 38) and continued such operations despite knowing they
23 were engaging in violations of the FLSA because such operations were personally
24 profitable to them (§ 39-40) and were therefore acting as decision-making agents with
25 vested powers to continue the FLSA violations at issue (§ 46). This clearly satisfies
26 the standard set by *Boucher v. Shaw*, 572 F.3d 1087 (9th Cir.2009) (“where an
27 individual exercises ‘control over the nature and structure of the employment
28 relationship,’ or ‘economic control’ over the relationship, that individual is an

1 employer within the meaning of the Act, and is subject to liability.” *Id.* at 1091 (citing
2 *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir.1999).

3
4 **CONCLUSION**

5 Wherefore, plaintiff’s motion should be granted along with such other and
6 further relief as the Court deems just and proper.

7 Dated: Clark County, Nevada
8 February 9, 2015

9
10 LEON GREENBERG PROFESSIONAL CORPORATION

11 */s/ Leon Greenberg*

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EXHIBIT “A”

FILED SEPARATELY UNDER SEAL